SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. [redacted] 168

CHARLES CARABBIA,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THOMAS R. ZEBRASKY,
Assistant Prosecuting Attorney,
Attorney of Record for Respondent.

CLYDE W. OSBORNE,
Prosecuting Attorney,

WILLIAM G. HOUSER,
Assistant Prosecuting Attorney,
Attorneys for Respondent,
Mahoning County Court House,
Market Street,
Youngstown, Ohio 44503.

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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1398.

CHARLES CARABBIA,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

QUESTIONS PRESENTED.

1. Did Petitioner suffer an abridgment of his Sixth Amendment rights to an impartial jury and the right of confrontation and was the State of Ohio obligated by the Fourteenth Amendment to give equal protection of the laws where:

(A) A juror on voir dire failed to disclose her 40-year friendship with a detective employed in the office of the Prosecuting Attorney.

(B) The trial court overruled pre-trial motions for election of duplicating counts and overlapping counts, such motions having been renewed at the close of the State's case where such court found there could be no intent in two of such counts.

2. Did Petitioner suffer an abridgment of his Fifth Amendment and Sixth Amendment rights by being brought to a speedy trial, where he was compelled to be

a witness against himself during the accusatory and custodial state of proceedings and where at such times he was deprived of the right to the advice of counsel and later deprived of the effective representation by counsel.

STATUTES INVOLVED.

Ohio Revised Code Section 2901.23; Ohio Revised Code Section 2901.24; Ohio Revised Code Section 2901.241; Ohio Revised Code Section 2941.04; Ohio Revised Code Section 2945.02. See Appendix.

STATEMENT.

The Petitioner, Charles Carabbia, was indicted secretly by the Mahoning County Ohio Grand Jury in the January Term 1964. The indictment was returned on March 5, 1964, Case No. 22255. The Petitioner was indicted on three separate counts in the one indictment, to-wit: Count No. 1, Ohio Revised Code Section 2901.23; Count No. 2, Ohio Revised Code Section 2901.24; and Count No. 3, Ohio Revised Code Section 2901.241. On March 6, 1964 the Petitioner appeared personally in court with his counsel and waived the reading of the indictment and entered a plea of not guilty to each count. A bond was set by the court at this time.

The Petitioner was arrested on March 2, 1964. On March 30, 1964 the trial commenced before the Honorable Erskine Maiden, Jr., Judge of the Court of Common Pleas of Mahoning County, Ohio, and on April 6, 1964, the jury found the Petitioner guilty under Count No. 3, Ohio Revised Code Section 2901.241 and not guilty under Counts No. 1 and No. 2. On April 17, 1964, after the hearing on the Motion For New Trial, said Motion was overruled and Petitioner was sentenced to a term of not less

than one nor more than five years in the Ohio State Penitentiary.

An appeal was perfected to the Court of Appeals, Seventh Judicial District of Ohio, and on October 13, 1966 said Court of Appeals unanimously affirmed the verdict and judgment of the trial court. Petitioner then filed his Notice of Appeal from the decision of the Seventh District Court of Appeals of Ohio to the Ohio Supreme Court. On February 8, 1967 the Supreme Court of the State of Ohio, in Case No. 40605, dismissed Petitioner's appeal, Sua Sponte, and ruled no substantial constitutional question was involved. No opinion was written by the Supreme Court of the State of Ohio.

ARGUMENT.

Petitioner's contention that a juror on voir dire failed to disclose her forty-year friendship with a detective employed in the office of the Prosecuting Attorney is not well taken. The trial commenced on March 30, 1964 and the attorney for Petitioner, in a signed affidavit, admitted he knew the juror in question was seen saying "hello" to the county detective on April 3, 1964. However, even though defense counsel is an officer of the court, this matter was not called to the attention of the trial judge at that time even though the trial continued to April 6, 1964. Had defense counsel called the matter to the attention of the trial judge and, if the acquaintanceship of the juror and the county detective had been considered prejudicial by the trial judge, the juror could have been dismissed and the alternate juror could have replaced her. The Seventh District Court of Appeals ruled that Petitioner and Petitioner's counsel did not exercise due diligence in calling this incident to the trial court's attention when the attorney knew about it in time for it to be corrected and

that Petitioner, thereby, waived any claim to this alleged error. (4 *O. J.* 2nd, 474, Section 1129.)

At a hearing in the Common Pleas Court in the above-alleged error, there was never the slightest evidence or hint that the fact that a juror knew the county detective of the Prosecuting Attorney's office had any bearing whatsoever on her verdict in this case. Incidentally, this acquaintanceship was denied by the county detective at the hearing. A reading of the record will reveal that the juror in question was never asked whether she knew the county detective. Before even misconduct of a juror is a ground for a new trial, it must be shown that the substantial rights of the Petitioner have been materially affected. (16 *O. J.* 2nd, Criminal Law No. 2, Section 671 *et seq.*) It was further brought out in the hearing on this matter that the county detective had been employed by the Youngstown Police Department for over thirty years prior to his employment with the County Prosecutor's office and that he had no recollection of ever having seen this juror previously.

The State of Ohio contends that Question No. 1 (B) raised by Petitioner is not well taken. Ohio Revised Code Section 2941.04 permits various counts under the same indictment and, also, states the prosecutor need not elect between the different offenses and counts set forth in the indictment. The authorities have been uniform in maintaining the right of the prosecutor where a single offense has been committed to include a number of counts in one indictment variously framed that meet possible contingencies that may arise in the introduction of the evidence. (28 *O. J.* 2nd, Criminal Law, Section 69.)

In 28 *O. J.* 2nd, Criminal Law, Section 71, the question of requiring a prosecutor to elect between counts is discussed and it says Ohio Revised Code Section 2941.04,

supra, makes it plain and it is so held that the prosecutor will not be required to elect where the several charges in the indictment relate to the same transaction, are connected together in their commission, or are simply variations or modifications. See *Overmyer vs. Sacks,* 174 O. S. 129; *Bates vs. State,* 29 O. A. 391.

In reply to Question No. 2 raised by Petitioner, twenty-four days elapsed from the time a not guilty plea was entered until the day the trial commenced. Ohio Revised Code Section 2945.02 requires the trial court to set all criminal cases for trial for a day not later than thirty days after the date of entry of the plea of Petitioner. This procedure was followed in the instant case.

The Petitioner was never compelled to be a witness against himself during the accusatory and custodial state of the proceedings and, further, he was never deprived of the right to the advice of counsel or at any time later deprived of effective representation by counsel. Respondent fails to see how the doctrine expressed in *Escobedo vs. Illinois,* 378 U. S. 478 (1964), and *Miranda vs. Arizona,* 384 U. S. 436 (1966), can in any way apply to the instant case. For that matter, counsel for Respondent fails to see how any of the impressive list of citations enumerated by Petitioner have any bearing on this particular case. A Motion for continuation to a subsequent term is addressed to the sound discretion of the court and the action of the lower court cannot be reversed unless it clearly appears from all the facts and circumstances that there has been an abuse of discretion operating to the prejudice of the party and the final determination of the case. (15 *O. J.* 2nd, Section 494, page 655; 3 *O. J.* 2nd, 730, Appellate Review, Section 765.) In the instant case the rights of the Petitioner, obviously, were not prejudiced because he was found not guilty by the jury on two of the three counts that he was indicted on.

CONCLUSION.

Respondent respectfully submits that the Petition for a Writ of Certiorari filed herein by Petitioner should be dismissed for the reason that no substantial question of injury to any rights of the Petitioner has been presented.

THOMAS R. ZEBRASKY,
Assistant Prosecuting Attorney,
Attorney of Record for Respondent.

CLYDE W. OSBORNE,
Prosecuting Attorney,

WILLIAM G. HOUSER,
Assistant Prosecuting Attorney,
Mahoning County Court House,
Market Street,
Youngstown, Ohio 44503.

APPENDIX A.

MEMORANDUM OPINION OF THE COURT OF APPEALS FOR MAHONING COUNTY, OHIO.

Dated: July 26, 1966.

LYNCH, *J.*

This is an appeal on questions of law by defendant-appellant on his conviction of assault on Rhonda Pinciaro with a loaded .38 caliber revolver and a sentence of one to five years in the Ohio State Penitentiary.

Defendant was indicted on three counts with reference to the alleged assault on Rhonda Pinciaro, namely, (1) shooting with intent to kill, wound or maim contrary to Section 2901.23, Revised Code, (2) assault with intent to kill contrary to Section 2901.24, Revised Code, and (3) assault with a dangerous weapon or instrument likely to produce death or great bodily harm contrary to Section 2901.241, Revised Code.

Defendant filed motions to quash the indictment and to compel the State of Ohio to elect between counts in the indictment, which were overruled. After trial, the jury found defendant guilty under Count No. 3, and not guilty under Counts No. 1 and No. 2.

A review of the record reveals ample evidence to substantiate the verdict of the jury; therefore, we overrule defendant's eighth assignment of error which contends that the verdict of the jury is contrary to the weight of the evidence and the law.

Defendant's sixth assignment of error alleged misconduct on the part of juror Miss Olivia Brown, who failed to disclose on voir dire examination, while under oath, that she was acquainted with Mr. Clyde Reid, who is employed as a detective by the County Prosecutor. Miss Brown signed a statement that she was introduced to Mr.

Reid through one of her friends many years ago. She spoke to Mr. Reid during the course of the trial, and this came to the attention of the attorney for defendant, who spoke to Mr. Reid concerning this. This trial commenced on March 30, 1964, and the attorney for defendant in a signed affidavit admitted that he knew about Mrs. Moore talking to Mr. Reid by April 3, 1964. However, this was not called to the attention of the Trial Judge, even though the trial continued to April 6, 1964. If this had been called to the attention of the Trial Judge, and if the acquaintanceship of Miss Brown and Mr. Reid had been considered prejudicial to defendant by the Trial Judge, Miss Brown could have been dismissed and the alternate juror could have replaced her. We hold that defendant did not exercise due diligence in calling this incident to the Trial Court's attention when his attorney knew about it in time for it to be corrected, and that the defendant has thereby waived any claim to this alleged error. 4 Ohio Jurisprudence (2d) 474, Section 1129.

Moreover, Mr. Reid testified that he had been employed with the Youngstown Police Department for almost thirty years prior to his present employment; that Miss Brown did speak to him during the course of the trial, but that he had no recollection of having even seen Miss Brown previously.

We cannot see how the bare acquaintanceship of Miss Brown with Mr. Reid could in any way influence either Miss Brown or the ultimate jury verdict. There is nothing in the record to indicate that Miss Brown's failure to disclose her acquaintanceship with Mr. Reid was intentional. We, therefore, hold that Miss Brown's presence on this jury was not prejudicial to the defendant.

In his fifth assignment of error defendant claims that a witness, Assistant Chief Robert Fink, of the Boardman

Township Police Department, gave a highly prejudicial answer. (Page 556, Volume 3.) On cross-examination, Officer Fink had testified that he had followed defendant to Rhonda Pinciaro's residence on several occasions prior to the incident which is the subject of this case. On re-direct examination, Officer Fink was asked why he followed defendant's car on prior occasions, to which he answered:

"He is a known racketeer, sir."

Defendant's attorney moved that this answer be stricken and that the Court withdraw a juror and continue this case. The Court ruled as follows:

> "That is stricken out as being a conclusion and the jury will disregard it. That is merely his opinion and opinions do not count at all. The motion to withdraw is overruled. Exception."

We hold that the Trial Court adequately cautioned the jury on this testimony, and that under the circumstances of this case, this was not prejudicial to the defendant.

We hold that the first two assignments of error which contend that the Trial Court erred in overruling the motions of defendant to quash the indictment and to order the State of Ohio to elect between counts in the indictment are not well taken. Section 2941.04, Revised Code. 28 *Ohio Jurisprudence* (2d) 482-486, Sections 69-71. See *Overmyer v. Sacks*, 174 Ohio St. 129; *Bates v. State*, 27 Ohio App. 391.

We also hold that the defendant's third assignment of error, which contends that the Trial Court erred in refusing the motion of defendant for continuance of the case is not well taken. 3 *Ohio Jurisprudence* (2d) 730, Appellate Review, Section 765, states as follows:

"An application for the continuance of a case is addressed to the sound discretion of the court, and its action cannot be reversed on error unless it clearly appears, from all the facts and circumstances, that there has been an abuse of this discretion, operating to the prejudice of the party in the final determination of the case * * *."

We hold that defendant has not clearly shown that the Trial Court abused its discretion in overruling this motion.

We also hold that defendant's fourth assignment of error, which contends that the Trial Court erred in limiting and restricting defendant in the interrogation of the members of the jury panel on the voir dire examination is not well taken. The counsel for defendant was given wide latitude in his questioning of prospective jurors, and the record shows the Trial Court kept the examination within proper limits.

32 *Ohio Jurisprudence* (2d), §63, Jury, Section 73, states in part as follows:

"* * * the scope and extent of the examination is largely within the discretion of the trial judge, and is not a ground for reversal unless there is a clear abuse of such discretion; * * *."

We hold that there was no such abuse of discretion in this case.

We have considered the other assignments of error of defendant and find them without merit.

After a careful examination of the record of this case, we conclude that this case was tried in a fair and thorough manner by experienced counsel for both sides before an experienced Judge. Counsel for both sides and the Trial Judge ably performed their respective roles in the trial of this case. We conclude that defendant received a fair trial.

There was an issue of fact in this case which was properly submitted to the jury. We feel that the verdict

of the jury indicates that they gave careful consideration to the evidence in this case. Defendant's right to a fair and impartial trial has been fulfilled, and he must abide by the verdict of the jury.

Judgment affirmed.

JOHNSON, *P.J.*, Concurs.
JONES, *J.*, Concurs.

APPROVED,
JOHN J. LYNCH,
Judge.

APPENDIX B.

JOURNAL ENTRY OF THE COURT OF APPEALS FOR MAHONING COUNTY, OHIO.

(Filed October 13, 1966.)

This cause came on for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, the transcript and the original papers and pleadings from the Court of Common Pleas, Mahoning County, Ohio, and was argued by counsel. On full consideration thereof the Court finds there is no error apparent on the record in said proceedings and judgment prejudicial to the Appellant.

It is therefore considered by the Court that the judgment of the Court of Common Pleas be and the same is hereby affirmed at the costs of the Appellant.

It is further ordered that a special mandate be sent to the Court of Common Pleas of Mahoning County, Ohio, for execution upon this judgment.

To all of which Appellant, by his counsel, excepts.

APPENDIX C.

MANDATE OF THE SUPREME COURT OF THE STATE OF OHIO.

(February 8, 1967.)

To the Honorable Common Pleas Court Within and for the County of Mahoning, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Dismissed, sua sponte, no substantial constitutional question involved.

THOMAS L. STARTZMAN,
Clerk.

APPENDIX D.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS, MAHONING COUNTY, OHIO.

(April 17, 1964.)

This day came on for hearing the motion for new trial filed herein, and the defendant Charles Carabbia being present in Court with counsel and the Prosecuting Attorney being present, the motion was heard and submitted; and thereupon the Court after full and due consideration overrules the same, with exceptions noted.

Defendant in open court waives his statutory right to file an application for probation.

Thereupon the Court proceeds to sentence; and the Court inquires of defendant Charles Carabbia whether

he have anything to say as to why sentence should not be pronounced; it is the sentence of the Court that defendant Charles Carabbia be taken from here to the County Jail and from thence to the Ohio State Penitentiary there to serve an indeterminate term according to law, of not less than 1 year nor more than 5 years and to pay the costs, this sentence being under R. C. 2901.241. Stay of execution is granted for 30 days to file an appeal and sentence is supended under R. C. 2953.09 pending completion of appellate proceedings, upon giving recognizance in the amount of $10,000.00.

E. MAIDEN, JR., *Judge.*

APPENDIX E.

INDICTMENT FOR INTENTIONAL SHOOTING: ASSAULT WITH INTENT TO KILL; ASSAULT WITH A DANGEROUS OR DEADLY WEAPON (3 COUNTS) (FELONY).

THE STATE OF OHIO, MAHONING COUNTY, SS.

In the Court of Common Pleas, Mahoning County, Ohio, of the Term of January in the year of our Lord one thousand nine hundred and sixty-four.

The Jurors of the Grand Jury of the County of Mahoning, and State of Ohio, then and there duly empaneled, sworn and charged to inquire of and present all offenses whatever committed within the limits of said County, on their said oaths, in the name and by the authority of the State of Ohio, do find and present:

That Charles Carabbia late of said County, on or about the 2nd day of March in the year of our Lord one

thousand nine hundred and sixty-four, at the County of Mahoning aforesaid,

FIRST COUNT: Did unlawfully and maliciously shoot at one Rhonda Pinciaro with intent to kill, wound or maim said Rhonda Pinciaro contrary to the statute in such cases made and provided and against the peace and dignity of the State of Ohio, to-wit: Revised Code 2901.23.

SECOND COUNT: And the said Grand Jury does further find and present that the said Charles Carabbia, late of said County, on or about the 2nd day of March, 1964, did unlawfully assault Rhonda Pinciaro with intent to kill her, contrary to the statute in such cases made and provided and against the peace and dignity of the State of Ohio to-wit: Revised Code 2901.24.

THIRD COUNT: And the said Grand Jury does further find and present that the said Charles Carabbia, late of said County, on or about the 2nd day of March, 1964, did unlawfully assault one Rhonda Pinciaro with a dangerous weapon or instrument likely to produce death or great bodily harm, to-wit: a loaded .38 caliber revolver, contrary to the statute in such cases made and provided and against the peace and dignity of the State of Ohio, to-wit: R. C. 2901.241.

CLYDE W. OSBORNE,
Prosecuting Attorney.

APPENDIX F.

STATUTES.

Ohio Revised Code Section 2901.23—Intentional shooting, cutting or stabbing.

No person shall maliciously shoot, stab, cut, or shoot at another person with intent to kill, wound, or maim such person.

Whoever violates this section shall be imprisoned not less than one nor more than twenty years.

Ohio Revised Code Section 2901.24—Assault with intent to kill, rape, or rob.

No person shall assault another with intent to kill, or to commit robbery or rape upon the person so assaulted.

Whoever violates this section shall be imprisoned not less than one nor more than fifteen years; except that whoever violates this section by assaulting any person who is performing his duties as operator of any motor vehicle, streetcar, or trackless trolley, as defined in section 4511.01 of the Revised Code, used for the transportation of persons for hire shall be imprisoned not less than three nor more than fifteen years.

Ohio Revised Code Section 2901.241—Assault with a dangerous or deadly weapon.

No person shall assault another with a dangerous weapon or instrument or by other means or force likely to produce death or great bodily harm.

Whoever violates this section shall be imprisoned in the penitentiary not less than one nor more than five years.

Ohio Revised Code Section 2941.04—Two or more offenses in one indictment.

An indictment or information may charge two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated.

The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict. The court in the interest of justice and for good cause shown, may order different offenses or counts set forth in the indictment or information tried separately or divided into two or more groups and each of said groups tried separately. A verdict of acquittal of one or more counts is not an acquittal of any other count.

Ohio Revised Code Section 2945.02—Setting and continuing cases.

The court of common pleas shall set all criminal cases for trial for a day not later than thirty days after the date of entry of the plea of the defendant. No continuance of the trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance.